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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 518

MORELAND H. HOGAN and INTERNATIONAL PARK CORPORATION,

Petitioners,

v.

IVOR B. CLARK CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent, Ivor B. Clark Co., Inc. submits this brief in opposition to the petition for writ of certiorari herein.*

JUDGMENT BELOW

At the conclusion of oral argument before the Court of Appeals for the Second Circuit, the Judgment of the District Court was unanimously affirmed in open Court. At the same time, the Court of Appeals denied, as academic, respondent's motion to dismiss petitioners' appeal. That motion rested on the ground that, by reason of still further refusal of petitioners (after Judgment) to comply with

*Petitioners and respondent are sometimes herein referred to as defendants and plaintiff, respectively.

Court rules (as to respondent's efforts to collect the judgment), petitioners had debarred themselves from the right to prosecute their appeal.

JURISDICTION

The Petition for certiorari is, by any standard, an extraordinary document. It is, at one and the same time, bereft entirely of any case citation, oblivious to the existence of the well-established criteria governing this Court's certiorari jurisdiction, and either obliterative or obfuscatory of even the most elemental facts of this case.

Petitioners' failure to cite supporting case authority is explicable by reference to the simple fact that there is none for the questions contrived by petitioners. Petitioners' failure to show that their questions comply with the requirements of certiorari jurisdiction—their failure to show that there is either a conflict among the Circuits, that an important, unsettled question of Federal law is presented, or that the Court of Appeals has acted in a way which so far departs from the accepted course of judicial proceedings to require this Court's intercession—is also understandable. There simply is not a possibility that anything in this case could satisfy one of those grounds. United States Supreme Court Rule 19(b).

The Petition here is really the equivalent of a quickly drawn, lightweight argument as if this case were first on appeal to the Court of Appeals. The Petition simply reflects a refusal by petitioners to recognize that they are not entitled to two appeals in the federal system, and that this Court does not function on certiorari as an automatic second reviewer of the Court of Appeals. *Magnum Co.* v. *Coty* 262 U. S. 159 (1923).

It is also noteworthy that the fifth and sixth supposed questions presented for review were never presented in either of the Courts below. Thus, even were they meritorious

certiorari questions—which they are not—they would not, except under extraordinary circumstances, qualify for consideration by this Court. *Lawn* v. *United States* 355 U. S. 339, 362 (1958), *California* v. *Taylor* 353 U. S. 553, 556 (1957).

STATEMENT OF THE CASE

Petitioners' Statement of the Case—even when viewed as purported support for their improvised "Questions Presented for Review"—is so truncated that no one would fairly understand how the Court of Appeals was so little impressed with the substantiality of petitioners' appeal that it affirmed the judgment of the District Court immediately upon conclusion of oral argument, and in open Court. Therefore, putting aside the fact that none of petitioners' questions even hints at meritorious certiorari jurisdiction, the total insubstantiality—the sham—of certain of the questions can only be appreciated in light of a fuller exposition of indisputable facts. We amplify the Statement of the Case with an awareness that this Court may well conclude that this is superfluous, and that the Petition, on its face, judged by the traditional requirements of certiorari, requires instant denial without more.

The District Court's Judgment arose out of an Order (4a-5a*) made by Hon. Sylvester J. Ryan, U. S. D. J., under Rule 37(b) of the Federal Rules of Civil Procedure wherein, 4 months after the making of an Order (3a-4a) for discovery under Rule 34 of the Federal Rules of Civil Procedure (Hon. Edward C. McLean, U. S. D. J.) Judge Ryan found that petitioners, not having produced what was required, were guilty of "wilful disregard" of the Order of Judge McLean (5a). Petitioners were afforded still another

*"a" references are to pages of Petitioners' Appendix. "R" references are to pages of the Record filed in this Court.

opportunity to comply, failing which their answers were to be stricken (5a). Upon petitioners' continued obdurate disobedience their answers were stricken and judgment entered (R. 576-591).

The Claims

Respondent, a well known mortgage financing specialist, sued for breach of a written agreement (R. 9) by which it was retained by petitioners "exclusively" to arrange certain commitments for financing in connection with defendants' vast real estate project known as the International Office Park Project.

The first claim of the complaint sought recovery of a stipulated fee for plaintiff having procured for those defendants in the Summer of 1965, a commitment in the sum of $4,250,000 from James Talcott, Inc. (R. 1-3). The second cause was based on the claim that while the exclusive written agreement was still in effect, and after certain temporary financing had been arranged for defendants by plaintiff, (permanent replacement of which was still being sought), defendants surreptitiously decided to try to, and did, arrange for such financing through others, without notice to or knowledge of the plaintiff. (R. 3-6)

In April 1966, on the pretext that it was allegedly appropriate to cancel the existing written agreement, which had been made with petitioner, Moreland H. Hogan, ("Hogan") and his corporation, International Office Park Inc., ("Office Park") and to substitute in place thereof an agreement involving Hogan's new corporation—petitioner, International Park Corporation, ("Park")—the old agreement was cancelled (R. 5). However, prior to that time, by months, Hogan and Park had secretly retained other brokers, arranged with them for substantially reduced brokerage commissions, and had made application for and had assurance of permanent financing for the project—permanent financ-

ing which was in fact provided by Mutual of New York in the sum of $3,850,000.00. The second count of the Complaint sought recovery of the commission provided in the written agreement for this permanent financing (R. 3-6).

Petitioners' answer admitted the making of the agreement and then generally denied liability (R. 59-63).

Petitioners' Early Motions:

The action was commenced in September of 1966. Service was effected in Georgia pursuant to Sections 302 and 313 of the Civil Practice Law and Rules of the State of New York. Almost simultaneously with the service of Answer by Hogan and Park, and after the service of notice to take the deposition upon oral examination of Hogan, petitioners moved for a change of venue (R. 76 *et. seq.*). Hogan moved as well for an order requiring that his deposition be taken only in Atlanta, Georgia (R. 64-69).

On the venue motion facts were shown which established beyond contradiction personal jurisdiction over defendants pursuant to the statute. For those facts confirmed the significant presence and activities of petitioners in the City and State of New York (R. 178-81, 138-39) in connection with these transactions and agreements. The retention of plaintiff by Hogan in New York, the activity of plaintiff and Hogan in New York in furtherance of financing efforts, and more, were all set forth beyond possibility of dispute. The consequence of this factual showing to the Court was such that not only was defendants' motion for change of venue denied, but the motion which sought to change the place of taking of Hogan's deposition—from New York to Georgia—was also denied (R. 189-196).

Petitioners' First Default:

Efforts were begun to fix a date for the commencement of Hogan's deposition. Those efforts encountered a series

of obstacles, which culminated in the default of Hogan to appear at the time and place provided for the commencement of his deposition (R. 224 *et seq.*). That first default was mere symptom of what was to come. Indeed, although the Court's Order gave respondent priority in deposition taking, simultaneous with his announcement of Hogan's non-appearance, his counsel served a notice to take the deposition of a witness—the result of which would have been that by his default Hogan also would have worked a rearrangement in deposition priority. (R. 194-96)

As a result of this studied gamesmanship, respondent moved for an order striking the answer of Hogan and Park, and also, in any event, to nullify the thrust of petitioners' untimely notice to take the deposition of a witness. That application was heard by Hon. Harold R. Tyler, U. S. D. J., who, although declining to grant relief sought under Rule 37(b), nevertheless directed Hogan to appear for his deposition on another date which he fixed therefor, (R. 263, 316-19). And, as at least nominal reflection of his appraisal of petitioners' conduct, he directed that plaintiff recover motion costs on the application. Judge Tyler also provided that the deposition of the witness noticed by petitioners could start only after the new date fixed for Hogan's deposition (R. 316, 319).

Hogan's Deposition:

The oral deposition of Hogan began. It promptly appeared that in preparation therefor Hogan had attended at a conference on the preceding day in New York, at counsel's office, where for some six hours he had reviewed matters germane to the case, not only with his own counsel, but with counsel for the other defendant (R. 452, R. 737-738). It further appeared that a group of documents was discussed and considered at the meeting. (R. 452, R. 743).

As the oral deposition progressed, and as answers given by Hogan demonstrated the existence of documents, material and germane to the case, requests for production thereof were made by respondent (R. 440). The requests were uniformly rejected by Hogan unless, as *quid pro quo,* respondent's counsel were willing to agree *carte blanche* to the production of any documents which petitioners might in the future request for production during deposition taking of the respondent by Hogan. The condition was not acceded to (R. 440). The result was that with one single exception, no documents whatever—whether then at the place of deposition or not—were produced. Since the deposition could not be completed until the pertinent documents had been seen, the deposition was deferred while respondent made a formal Rule 34 motion for discovery (R. 327-331).

The Rule 34 motion set out 9 different specifications of documents, discovery of which was sought (R. 328-330). In many instances the description paralleled and stemmed from answers given by Hogan in the course of his oral deposition. All of the documents sought were documents plainly material to the case (R. 448).

Before the Rule 34 motion was heard, plaintiff also served notice to take the oral depositions of certain witnesses in Atlanta, Georgia. These included petitioners' secret mortgage brokers. On the virtual eve of the scheduled depositions, and despite the fact that subpoenas had already been served out of the District Court in Georgia for most of the deponents, defendants moved for deferral of the depositions, and in any event to require plaintiff to pay the cost of defendants' representation at the taking thereof. Defendants' attempt to delay the deposition was not countenanced by the Court. However, the Court did require that plaintiff advance counsel fees to defendants' attorneys for attendance in Atlanta and pay as well the expenses of such attendance (R. 393, 442, 453, 457).

Counsel went to Atlanta during the week of August 14, 1967. There ensued four days of deposition taking of witnesses (3a).

At the time counsel went to Atlanta, the motion papers under Rule 34 had already been served, and the full swath of the documentary production sought was known. When the Atlanta depositions were completed petitioners' counsel returned to New York and prepared and filed papers in response to the Rule 34 motion (R. 396-424).

Suddenly, petitioners' prior unyielding refusal to produce documents disappeared entirely. Of course, they meanwhile had gained the advantage of a 2½ month delay. However, with one exception which we shall discuss, Hogan and Park raised absolutely no objection to all of the discovery sought (R. 399-400).

Petitioners did not in fact contest respondent's showing of good cause; they did not contest the sufficiency of the description of the documents sought; they did not even suggest that the documents were either not in existence or not within their custody or control (R. 400).

Petitioners did, however, seek one important protection. They told Judge McLean that the documents embraced by the discovery motion fell into two categories. First, there allegedly was a group of documents (whose production would be required) which were already in New York, having been supplied to Petitioners' counsel (R. 400). As to these, petitioners' counsel raised absolutely no difficulty. These, he said, could be examined at his office in New York at mutual convenience (R. 400). However, this group of documents was but "a small portion" of the documents embraced by the motion (R. 400, R. 440).

In respect of the remainder—allegedly located in Atlanta—petitioners' counsel told Judge McLean on the oral

argument that the volume of documents was substantial, amounting to as many as would be contained in three file drawers. The difficulty and inconvenience of moving so large a volume of papers prompted petitioners to request that the Court require respondent to go to Atlanta to examine that group of documents (R. 441).

When Judge McLean learned that counsel for the respective parties had just returned from Atlanta, at respondent's expense—when he realized that the discovery motion was in petitioners' hands at the time of the trip to Atlanta—and (in view of petitioners' non-objection thereto) that discovery could have been accomplished at the same time as counsel were in Atlanta, he, with wisdom, neatly disposed of petitioners' request. He ordered that petitioners had the option of producing the documents in New York, or, if they chose, producing them for inspection in Atlanta, provided, as to the latter, that *they* advanced the expenses and paid a counsel fee of respondent's counsel to go to Atlanta to accomplish the inspection (3a-4a).

Judge McLean made his Order on September 2, 1967. On September 14th respondent's counsel attended at the office of petitioners' counsel to inspect the first group of documents, i.e., those few which had already been in New York at the time of the making of the Rule 34 motion. Copies of 36 documents were produced for inspection at that time, (R. 442).

Even before the inspection of this first group of documents, respondent's counsel had written to petitioners' counsel to inquire whether defendants had decided to produce the Atlanta documents in New York or avail themselves of the alternative provided by Judge McLean's Order (R. 470). Petitioner's counsel wrote that he was "awaiting word from [his] client as to the manner and time of production * * *" of the Atlanta documents. Counsel promised that he would

communicate to respondent his clients' decision (R. 471). That communication never came.

Respondent again demanded that petitioners determine and announce their position with respect to the production of the Atlanta documents (R. 472). By letter of September 15th Hogan's counsel stated—and it is a most important statement—"* * * I am pressing my client to send all of his files relating to this case (including originals of documents to the extent he has them) to me in New York as soon as possible" (R. 474).

Respondent then waited 26 more days. When, by October 11th, no documents had been received from petitioners' counsel, respondent wrote to say that unless it was advised by return mail of petitioners' proposal for compliance with Judge McLean's order an appropriate application would be made to the Court (R. 475-476). Thereafter, plaintiff's attorneys received from petitioners' counsel, without letter of transmittal or other covering document, a photocopy of a letter dated October 16th, 1967, purportedly signed by Hogan and addressed to his own counsel (R. 477). Therein, Hogan casually pushed aside 6½ weeks of default in compliance with Judge McLean's Order with the bland observation *to his counsel* that he had been "* * * required to spend several days in New Orleans" and that "I expect to mail all of these documents to you [Hawkins] no later than Wednesday October 18, 1967" (R. 477-478).

Although Hogan, Park and their counsel knew, as at August 24, 1967 (the date of the Affidavit in response to the Rule 34 motion) that they would voice no objection to the production of any of the documents sought on the motion, the fact is that there was not a single document produced from the Atlanta three-file-drawer location until Saturday, October 21, 1967. That was exactly seven weeks after Judge McLean's Order. If compliance seven

weeks after the Order had resulted in the production of the three file drawers of papers, respondent would have had cause for complaint about the delay—tempered, however, by the presumed fullness of the production. But the *quantum* of documents delivered on October 21, 1967, which had not theretofore been delivered in New York, aggregated *twelve sheets of paper* (R. 443). Petitioners' counsel simply made a photostatic copy of Hogan's letter to him, and that letter, together with its enclosures, became the purported compliance with Judge McLean's Order. Hogan's counsel apparently could not even bring himself to endorse that outrageous position, for he only said "I trust the attached letter and its enclosures are self-explanatory" (R. 477). They were. The letter made clear Hogan's absolute failure to comply with the outstanding discovery Order.

At this stage, and in the face of Hogan's plain refusal to comply with the Order of Court, respondent made application for an order pursuant to Rule 37(b) of the Federal Rules of Civil Procedure striking the answer of petitioners and rendering judgment against them by default for the relief requested in the Complaint (R. 433-435).

The Extent of Petitioners' Default:

Petitioners' utter failure to produce the documents within the categories of Judge McLean's Order was exemplified by reference to only four of the nine categories of documents required to be produced thereunder. Those four categories were (R. 328-29):

> "3. All correspondence, records, files, submissions, appraisals, architects' plans, memoranda or notes concerning or relating to financing, or commitments for financing, sought or obtained from Mutual of New York, the Citizens & Southern Bank or any other lending institution, for the International

Office Park Project or part thereof, International Office Park, Inc., or International Park Corporation (Deposition Transcript pp. 181, 169, 297, 325)."

* * *

"5. All letters, agreements and other writings on or with reference to the acquisition of and disposition of Hogan's interest in International Office Park, Inc., and the acquisition by Hogan or his instrumentality, of the International Park Project or part thereof. (Deposition Transcript pp. 33, 253)."

"6. All correspondence, memoranda and other writings between Hogan and third parties, including, but not limited to, Citizens & Southern Bank; Taylor Bros., Inc.; Barrett & Knight; Philip Barrett; Theodore Knight; Spratlin, Harrington & Thomas, Inc.; William R. Patterson and Frank Coggin, concerning or on the subject of, and the terms and conditions of, the retention of any of these persons, firms or organizations, or others, to obtain financing, temporary or permanent, whether or not consummated, for the International Office Park Project, or part thereof, International Office Park, Inc., and International Park Corporation (Deposition Transcript pp. 343, 344)."

* * *

"8. All proceedings, transcripts, stipulations, settlement agreements, records and other writings relating to or concerning a suit commenced by Surety Investment Co. against Moreland H. Hogan and International Office Park, Inc. in April or May, 1965 (Deposition Transcript p. 99)."

Each of these categories represented something, the existence of which was disclosed and confirmed by the oral deposition of Hogan or of a witness. For example, it was incontestable that in 1965, Hogan and his associates in Office Park had a serious falling-out which resulted in a lawsuit by Hogan's partners against him. Indeed, they appear to have recovered a judgment for more than $3,000,000. This serious dispute was later settled by certain agreements and conveyances of Project property by and among Hogan his associates and their corporations. Further, it was incontestable that Hogan and Park obtained commitments from Mutual of New York for two loans cumulating $3,850,000 (R. 448). These loans were applied for in writing (R.448). Submissions were made in connection with and in support of these loans (R.448). The usual roster of papers, both business and legal, were made and exchanged by and among Hogan, his corporation, and the lender.

Under Category 3 of Judge McLean's Order, defendants were required to produce their files relating to commitments for financing sought or obtained for the International Office Park Project. Their files were not produced. Three pieces of paper were produced in response to Category 3, of which only one related, by any remote standard, to financing sought or obtained from Mutual of New York—a photostat of two checks in payment of fees to Barrett & Knight, defendants' secret mortgage brokers (R. 449). And, although at page 297 of Hogan's deposition (R. 1012) the examiner requested the Closing Statement reflecting the closing of the Mutual of New York loan, plaintiff was supplied instead with a Closing Statement on a Talcott loan (R. 449). Despite the critical importance to plaintiff of production of documents relating to communications and transactions on the

financing sought and obtained from Mutual of New York, not one document reflecting communications between defendants, their representatives and Mutual of New York, was supplied by them (R. 449).

In Category No. 5, defendants originally produced only one document relating to the disposition of Hogan's interest in Office Park. That is the Talcott Closing Statement. Yet, the transaction by which Hogan disposed of his interest in Office Park included, *inter alia,* agreements calling for resolution and settlement of a lawsuit, the division of the International Office Park Project and the closing of a loan in the sum of $2,300,000 (R. 449).

In Category No. 6 there was no compliance with the Order. Referring to the requests set forth at Hogan Transcript Page 344—for the production of the Mutual of New York commitment on the apartment loan and related papers—Hogan stated (before the Rule 37(b) motion was brought) that the Mutual of New York commitment on the apartment loan has been "replaced". Hogan's statement that "these papers are attached hereto" was crossed out (R. 450). As to Category 8, Hogan stated that he had not produced the documents set forth within that category (R. 450). He sought to avoid responsibility for non-production of these documents by the assertion that those documents were not within his possession. But in whose possession were those documents? As Hogan stated, they were at his Atlanta attorney's office. (R. 450).

In sum, before the motion under Rule 37(b) was made, petitioners produced an aggregate, exclusive of duplicates, of 53 documents which in relation to 3 file drawers of records would not even fill a minute portion of one drawer.

The Testimonial Background Against Which Petitioners Defaulted in Production of Documents:

Hogan's oral testimony given during his deposition had critical relation to the default leading to the Judgment. Thus, in the course of examination, one critical matter was whether or not, having made plaintiff "exclusively" the entity through which financing would be obtained, defendants had, *while that agreement was still in effect,* initiated negotiations or communications with other brokers or lending institutions to obtain commitments for financing. Hogan testified, time and time again, that he had *not communicated* with any person, including, specifically, other brokers, about trying to arrange for financing until *after* the cancellation of plaintiff's written agreement on April 4th, 1966. The answers consisted not only of those denials, but embodied as well affirmative statements that no such activity had transpired until *after* April 4th, 1966. Hogan testified that his first such communication took place between April 5th and 10th, 1966. (R. 453).

At the time of his deposition, conscious of his counsel's refusal to produce documents at the deposition, Hogan apparently operated under the delusion that not only would his counsel continue to be successful in blocking discovery of the mountain of documents reflecting Hogan's activities, but that plaintiff might be dissuaded from ever making any effort to procure testimony from other witnesses concerning Hogan's secret activities. Plaintiff was not dissuaded. For, in addition to the Rule 34 motion, plaintiff took depositions of witnesses in Atlanta. Those witnesses' depositions proved many things. But there is one salient fact which stands out above all others. Despite Hogan's preparation for his oral deposition, and despite the unyielding consistency of Hogan's answers under oath, Hogan was by document—documents signed by Hogan—

and by the sworn testimony of others involved with him in these transactions, a crass liar as to matters at the heart of the litigation.

A meaningful sample of these falsehoods falls into at least three categories. First, Hogan uniformly testified that neither he nor his agents had communications with Mutual of New York prior to April 5, 1966. That statement was false. Second, Hogan uniformly testified that he had no communications with a broker (other than plaintiff) prior to April 5, 1966. That was false. Finally, Hogan testified that he had not learned of a commitment for financing from Mutual of New York until the end of April—beginning of May, 1966. That was false (R. 454).

With reference to communications with Mutual of New York, Hogan testified (R. 455).

> "Q Did you ever before April of 1966 submit anything about the project to Mutual of New York or any of its representatives?
>
> A No.
>
> Q Did anybody on your behalf before April of 1966 submit any material about the project to Mutual of New York or any of its brokers or representatives?
>
> A No."

On the subject of communications with Barrett & Knight, or other mortgage brokers, Hogan testified (R. 455):

> "Q Did there come a time, Mr. Hogan, when some financing was arranged with respect to this project with Mutual of New York?
>
> A Yes, in the spring of 1966.
>
> Q Was there a broker on that?
>
> A Yes.

Q Who was the broker?

A Barı ett & Knight.

Q Of what city?

A Atlanta.

Q When for the first time did you ever speak to anybody at Barrett & Knight about financing for this project?

A It was in the—oh, I would say it was after April 5th of 1966."

* * *

"Q We have had the record read back and it indicates that your reference to April 5th was preceded by the word "after," and my question to you now is how is it that you are able to tell me, as you did, that it was after April 5th that you saw the firm of Barrett & Knight?

A Well, I just remember that it was after that time.

Q April 5th is a very specific date.

A I don't know how I am able to remember it. I remember that.

Q Did they come to see you on that day?

A No, I don't believe they came to see me on that day.

Q Did they talk to you on that day?

A They talked to me, I would say, some time between April 5th and April 10th."

* * *

"Q And this is the time which you say you are able to tell us is after April 5th?

A Yes.

Q And that is without question in your mind right now?

A Right."

As to communications concerning commitments for financing procured from Mutual of New York, Hogan testified (R. 456):

"Q When did you close the loan with Mutual of New York?

A I think we closed the office building loan in June, the early part of June.

Q 1966?

A 1966.

Q What was the date, the first date upon which you knew that Mutual of New York had issued a commitment?

A Around the end of April, the first of May.

Q How was it that you came to know that?

A Mr. Barrett had called me.

Q Did he do that in writing or orally?

A The first time, he orally told me."

In contrast to Hogan's testimony, which attempted to erase the trail of his deliberate misconduct, even the limited documents plaintiff was able to adduce from others, and witnesses' oral testimony, showed the following.

The depositions of Philip S. Barrett and Barrett & Knight—Hogan's secret brokers—showed that the first written communication in the Barrett & Knight files concerning the International Park Project was dated February 3, 1966—two months before defendants' purported cancellation of the exclusive agreement with plaintiff. Barrett, having been presented with this communication (which bespeaks even earlier activity on his part), testified (R. 455 *et seq.*)

"Q I appreciate that, but now that you've seen this letter and read it, is your recollection refreshed as to when you first met with Mr. Hogan?

A Then I would say it was the beginning of February rather than the beginning of March.

Q And is your recollection refreshed as to when you first received the communication from Mr. Hogan again?

A It was shortly before this date.

Q Well, let's get the order of things well in hand. Your first communication was with Mr. Coggin [Hogan's attorney].

A Right.

Q And two or three days later you met with Mr. Hogan, is that right?

* * *

A I'll say shortly thereafter.

Q All right. And thereafter you spoke with a representative of Mutual of New York?

A That's true.

Q Is that right? And thereafter you were communicated—you received a communication from Mutual of New York that they wanted an up to date appraisal.

A That's true.

Q And you communicated that fact to Mr. Hogan?

A That's true."

Barrett's testimony clearly showed that this first meeting he described is the same meeting which Hogan described, but for one salient difference. Hogan said it took place between April 5th and April 10th, 1966. Barrett said that the meeting took place at about the beginning of February, 1966, and that shortly thereafter, he communicated with Mutual of New York and so advised Hogan. If Hogan had suggested that Barrett's recollection was not

to be credited in preference to his testimony, that position would be untenable when reference is had to documents consisting of two letters on Hogan's stationery, both of which are dated February 8, 1966 (R. 484). Both were addressed to Mutual of New York. Both on their face indicated copies sent to Barrett. Both proved beyond shadow of doubt that by February 8th Hogan had already begun his covert breach of his agreement with plaintiff.

There was more. By letter of the same date—February 8, 1966—the secret broker, Barrett, wrote Mutual of New York, submitting papers in support of an application for financing, including a formal written application therefor (R. 483-4). A copy of the application itself bore the signature of Hogan (R. 486-7). Thus, those documents, supplied in connection with the deposition of the witness, Barrett, memoralized Hogan's lies, both as to his assertion that he had no communication with Barrett & Knight prior to April 5th, and as to his assertion that there was no authorized communication with Mutual of New York prior to that time. And despite the fact that these very documents were clearly within the requirements of production under Judge McLean's Order, defendants produced their copies of none of them (R. 459-60).

Beyond the fact that Hogan had already made formal application through Barrett & Knight to Mutual of New York by February 8th, it was incontestable that by agreement dated March 8th, he gave a written authorization to Barrett & Knight to obtain a loan commitment for the Project (R. 488). That document proves that Hogan was to pay Barrett & Knight a significantly lower commission than he was then obliged to pay plaintiff under the existing "exclusive agreement". Documents relating to this transaction with Barrett & Knight were required to be produced under Judge McLean's Order. They were not produced.

Finally, Hogan testified that he was not informed of the existence of a commitment for loan financing issued by Mutual of New York until either the end of April or the first of May, 1966. He said that he was advised of it by Barrett orally, and thereafter received written confirmation of that fact. But a letter of commitment issued by Mutual of New York to Hogan's secret brokers, Barrett & Knight, dated April 4, 1967 (R. 488 *et seq.*) and letter from Barrett to Hogan dated April 13, 1966, with which he transmitted to Hogan a copy of the commitment letter (R. 491) shattered Hogan's further attempt to reorient the history of the events which occurred earlier. And Hogan's signature, accepting the commitment, is dated April 18, 1966 (R. 491). All such documents—which like all of the others here involved, were regular, important, business records of a substantial, going business concern*—were required to be produced by petitioners. None of them were.

Petitioners' Response to the Motion Under Rule 37(b):

Petitioners' response to the Rule 37(b) motion was extraordinary. For, in the face of the unassailable fact that most of the documentary production required by the discovery order had not been supplied, petitioners' original response to the motion consisted only of an affidavit from their counsel (R. 497-503). Although the petition does not mention it, Hogan originally submitted no paper to answer, explain or cast light upon petitioners' default.

In response to plaintiff's reference to defendants' earlier proposition that there were about three file drawers of documents responsive to the Order for production, counsel's affi-

*There is substantial authority for the proposition that the law presumes possession or custody by a business of its important records. *Goldman* v. *Checker Taxi Co., Inc.*, 325 F. 2d 853, 856 (7th Cir. 1953), *McDowell Associates, Inc.* v. *Pennsylvania R. R. Co.*, 20 F. R. D. 219 (S. D. N. Y. 1957).

davit tried to explain away the impact of that previous position (R. 499-500). For it was now asserted that what counsel had said in support of defendants' plea that discovery should be held in Atlanta was said *in ignorance* of whether or not the documents existed, and that what counsel had meant was that *if* all the documents encompassed within the discovery order—*which unquestionably had at one time existed*—had been *kept*, this would have amounted to approximately three file drawers of papers (R. 501).* But having said that, and having conceded as he had to, that the documents were documents which demonstrably existed at one time, counsel then entirely failed to supply any hint or suggestion of what might have happened to these three file-drawers of documents to account for their non-production (R. 501 *et. seq.*). And so, while counsel professed his alleged ignorance, petitioners remained mute.

Judge Ryan immediately perceived the utterly disingenuous nature of this straddle. Judge Ryan refused to accept the affidavit of counsel as proper response to the application (R. 562). He directed the filing by Hogan of an affidavit within a specified period of time (R. 563). And it was not just *any* affidavit which Judge Ryan was interested in seeing. He defined with particularity that which the affidavit was required to disclose. For, if petitioners were then going to take the position that they did

*Judge McLean stated in his Order (3a):

> "Some of the documents are in New York. They shall be produced here.
>
> "As to the other documents, the only question is whether they shall be produced in Atlanta where defendants are situated *and where the documents are located*, or in New York." (emphasis supplied)

Plainly Judge McLean was not under the impression that defendants' representations about the Atlanta documents were made in alleged ignorance.

not have these documents any longer, Judge Ryan wanted to know specifically: (a) What efforts had been taken to produce the documents within each category; (b) when those efforts were made; (c) by whom they were made, and (d) with reference to documents allegedly no longer able to be located, an explanation of what had happened to such documents, i.e., whether they had been lost, destroyed or otherwise disposed of (R. 563). The Court also took note of the fact that, although Judge McLean's Order was then more than 2 months old, defendants had the temerity on the return of the motion to announce (without any prior intimation thereof) that certain documents were still allegedly in the process of being gathered and would be supplied in the future (R. 565-66).

Hogan's "Affidavit" was filed a week later (5a, 7a). And against the meaningful and precise requirements defined by Judge Ryan, that "affidavit" was in affront to the Court. First, as Judge Ryan noted, it was not even an affidavit at all.

It developed that this document had apparently been composed by Hogan himself without the intervention or benefit of counsel. The document simply ignored the Court's requirements. It did not supply a particle of the information which the Court required by its previous direction (R. 563 *et seq.*). The Court was not permitted by Hogan to know anything more than Hogan wanted it to know.

Judge Ryan picked up the gauntlet so boldly thrown down by Hogan. He said the document was "insufficient" and "evasive". He held (5a):

> "When this motion was heard by me on November 9, 1967, at argument I directed that the defendants submit an affidavit of HOGAN, explaining the non-compliance of the defendants. This has not been done and, save for a partial production of a small

> portion of the total documents covered by the order, there has been no compliance with the order. A totally insufficient, evasive and inadequate statement of HOGAN has since been filed, but it is palpably insufficient to justify defendants' apparent wilful disregard of Judge McLean's order."

And so it is seen that entirely contrary to the suggestion of the petition (p. 9), Judge Ryan did in fact explicitly find a "wilful" refusal.

Even then Judge Ryan's patience with petitioners was not exhausted. Despite everything, Judge Ryan afforded petitioners still further time in which to produce the required documents, in default of which Judge Ryan said that he would proceed with the entry of judgment (5a). Petitioners' response was another jest. They arranged with one of the witnesses whose deposition had earlier been taken in Atlanta by plaintiff, to produce in New York that witness' files—the very same files which had months earlier been examined by respondent's counsel in connection with the Atlanta deposition of that witness. And so after the additional time had expired petitioners were in the position where they had not produced one single additional document from their files.

Respondent then submitted an order to the Court. Hogan then submitted an affidavit in support of a proposed counter-order. He improvised new explanations of the failure to produce documents, explanations which were totally inadequate to meet the requirements of Judge Ryan's original direction and also so plainly improvised and contrived as last moment material to avoid the impending effectuation of the Court's order that they were simply put aside by the District Judge. Judge Ryan signed respondent's proposed order.

After the entry of judgment, there being no stay, respondent sought pursuant to Rule 69(a) of the Federal

Rules of Civil Procedure to depose petitioners upon oral examination in aid of collection. An application was made to the District Court for an order specifically requiring Hogan's appearance for an examination. That application was denied by Hon. Inzer B. Wyatt, U.S.D.J., on the ground that there was no authority for such an *order*. Judge Wyatt, however, specifically noted the available procedure of serving a routine notice for such examination, and explicitly suggested that in the event the notice was not complied with, appropriate motion could be made to the Court of Appeals in respect of petitioners' then pending appeal. Respondent then served such a notice and, as could be predicted, Hogan defaulted in appearance. It was this default which prompted respondent to move the Court of Appeals for the Second Circuit to bar petitioners from seeking appellate relief while they were continuing their brazen defiance of litigation obligations.

ARGUMENT

PETITIONERS "QUESTIONS PRESENTED" ARE PATENTLY FRIVOLOUS AND PRESENT NOTHING FOR REVIEW BY THIS COURT.

A. Question 1

Petitioners' first "Question" asks:

> "1. Whether a District Court is authorized by Rule 37(b)(2) of the Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, in the absence of an affirmative showing that the documents

were at the time of the order in the possession, custody or control of the party."

But how on the facts in this case can this "question" even be asked?

Upon the hearing of the Rule 34 motion petitioners earnestly requested the Court to require that plaintiff conduct its discovery in Atlanta—on the ground of convenience—on the ground that it would be unreasonable in view of the bulk of documents covered—as much as some 3 file drawers full—for defendants to be compelled to bring them to New York.

Surely, however, it is unthinkable that petitioners could have advanced this representation, (which would have, if successful, prompted an order from the Court requiring plaintiff *to return to Atlanta* to examine this group of documents) if in fact the documents sought did not exist, were not in the custody of defendants, or were of a volume so small that a 12¢ stamp could have carried them through the mails first class. Indeed, it is unthinkable that any such prayer for protective treatment could be made unless the proponents thereof affirmatively knew and sponsored to the Court (and must be deemed so to have done) the proposition that existing physical facts were such as to justify such special treatment. In short, defendants cannot in the face of their previous position be allowed to contest that the documents responsive to the discovery order were in existence in their custody in Atlanta and were of such nature and volume as to justify such a burden on the plaintiff. For, if this be not so, then these defendants are and were in the position of having asked the Court for an order which, if granted on their representations, would have required plaintiff to go to Atlanta, paying its own expenses and the ex-

penses of defendants' counsel again, there to be met with the information that there either were no documents in existence required for discovery or that the volume of such documents was miniscule.

What Judge Ryan did here was to draw the very conclusion which defendants urged and prayed Judge McLean to accept—a conclusion Judge McLean did accept. In a sentence, how could defendants accuse Judge Ryan of an "irrational" inference (as they said in the Court of Appeals) in making the inference of existence and custody of the documents for discovery, when it is the very same conclusion they asked Judge McLean to accept based upon their representations? We submit that defendants cannot be heard to contradict themselves in this fashion. By virtue of these prior representations, defendants have admitted the existence of these documents and as such are barred from asserting the contrary.

Even if, *arguendo,* we test defendants' belated, contrived explanation that they did not absolutely represent that there were three file drawers of documents in existence—covered by the discovery order—but that this was only the volume of such papers originally, and only if they had been preserved—the result is the same. Judge Ryan was at least willing to hear from them—under oath—in substantiation of any efforts to locate the required documents and detailing circumstances of their loss or disappearance. But defendants simply refused to respond to the Court's direction. They wanted immunity for discovery granted by their own *ipse dixit.* Since a party who is under compulsion to produce a document concededly once in his possession is under obligation meaningfully to explain his failure to do so (See: *Societe Internationale* v. *McGrath* 11 F. R. D. 294 (D. D. C. 1951), *United States* v. *United Shoe Manufactur-*

ing Corporation 76 F. Supp. 315 (D. Mass. 1948), the Court's inference is separately and independently justified by the failure of defendants to supply the explanation required.

Beyond the direct factual support, there lies the law which undercuts petitioners' first question.

Judge Ryan held that the petitioners' failure to oppose the Rule 34 motion justified an inference that the documents sought for discovery were in existence or under petitioners' control at that time. That inference was clearly correct. *Wharton* v. *Lybrand, Ross Bros. & Montgomery,* 41 F. R. D. 177, 180 (E. D. N. Y. 1966), *Soetart* v. *Coca-Cola Bottling Co.,* 16 F. R. D. 1 (W. D. Mo. 1954); *Schoenberg* v. *Decorative Cabinet Corp.,* 27 F. Supp. 802, 803 (E. D. N. Y. 1939); *Condry* v. *Buckeye S. S. Co.,* 4 F. R. D. 310 (W. D. Pa. 1945); *Tobin* v. *WKRZ, Inc.,* 12 F. R. D. 200 (W. D. Pa. 1952); *William A. Meier Glass Co., Inc.* v. *Anchor Hocking Glass Corp.,* 11 F. R. D. 487 (W. D. Pa. 1951); *Maegeson* v. *Boston and Maine Railroad,* 16 F. R. D. 200 (W. D. Mass. 1954).

The proper method to challenge existence or control of documents sought under Rule 34 is a counter-affidavit on the Rule 34 motion. *Tobin* v. *WKRZ, Inc., supra, William A. Meier Glass Co., Inc.* v. *Anchor Hocking Glass Corp., supra.* Since no such counter-affidavit was filed here on the Rule 34 motion, since most, if not all, of the groups of documents had been affirmatively disclosed and identified by Hogan on his deposition, the making of the Order under Rule 34 justified by itself the inference made by Judge Ryan as to existence and custody or control of the documents by petitioners.

By not opposing respondent's Rule 34 motion on the score of existence, custody or control of any of the docu-

ments therein sought, petitioners surely must be deemed to have waived any right they may have had to object to the order for discovery on that score. Their knowing and deliberate consent to the discovery properly stands as an affirmative admission that at the time of the application the documents sought were not only in existence, but in their custody or control. (So, plainly, did Judge McLean conclude, as evidenced by the language in his Order.)

The authorities establish that failure to advance permissible objections to a Rule 34 motion, at the time of the hearing of that motion, waives those defenses. The waiver precludes re-litigation of those objections on a Rule 37 motion. *Diapulse Corporation of America* v. *Curtis Publishing Company,* 374 F. 2d 442, 445 (2d Cir. 1967).

B. Question 2

Petitioners' second question asks:

> "2. Whether a District Court is authorized by Rule 37(b)(2) of the Federal Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, without making an express finding of fact that there has been a willful refusal by such party to produce documents which were at the time of the order in his possession, custody or control."

As we have noted, Judge Ryan made an explicit finding of "willful" refusal. Since the correctness of that conclusion cannot seriously be argued—and certainly not on this Petition—here again the contrived question simply cannot be asked on this Record.

C. Questions 3 and 4

Petitioners ask:

> "3. Whether the order and judgment of the United States District Court for the Southern District of New York striking the answer of the defendants Moreland H. Hogan and International Park Corporation and entering judgments by default against them, which action and judgments were affirmed by the decision and judgment here sought to be reviewed, was "just" as required by Rule 37(b)(2) of the Federal Rules of Civil Procedure.
>
> 4. Whether the order and judgment referred to in the preceding paragraph was, under the facts and circumstances, an abuse of the discretion vested in the District Courts by Rule 37(b)(2) of the Federal Rules of Civil Procedure."

On this Record these "Questions" would be transparently frivolous even under the review which the Court of Appeals would afford. Their sham as certiorari material is *a fortiori.*

F. R. Civ. P. 37(b) explicitly provides that the court may make an order striking out pleadings or rendering a judgment by default against a party guilty of disobedience of a discovery order.

In *Bourgeois* v. *El Paso Natural Gas Co.*, 257 F. 2d 807, 808 (2d Cir. 1958), the Court affirmed a dismissal of the complaint because of plaintiff's willful failure to appear for the taking of his deposition. See also: *Campbell* v. *Johnson*, 101 F. Supp. 705, 707 (S. D. N. Y., 1951); *White Pine Copper Co.* v. *Continental Ins. Co.*, 166 F. Supp. 148, 161 (W. D. Michigan, 1958).

In *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602, 614 (2d Cir. 1963) *cert. den.* 380 U. S. 248 (1965) the Second Circuit observed:

> "In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year."

Unless the District Court's discretion was plainly abused, its decision should not have been disturbed by the Court of Appeals. *Graves* v. *Mt. Vernon Trust Co.*, 69 F. 2d 101 (2d Cir. 1934). See also: *Delno* v. *Market Street Ry. Co.*, 124 F. 2d 965, 967 (9th Cir. 1942).

Two recent cases make clear the absolute correctness of Judge Ryan's determination. *Jones* v. *Uris Sales Corp.*, 373 F. 2d 644 (2d Cir. 1967); *Diapulse Corp. of America* v. *Curtis Publishing Co., supra.*

D. Questions 5 and 6

Petitioners ask:

> "5. Whether, after striking the answer of a defendant for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, a District Court has authority under Rule 37(b)(2) of the Federal Rules of Civil Procedure to enter a judgment by default against the defendant where the defendant, a resident of a State other than that in which the court is located, has in his pleadings, by way of an affirmative defense, challenged the court's jurisdiction on the

ground it has no jurisdiction of the person, and there has been no determination of that issue.

6. Whether the entry of a judgment by default against a defendant in the circumstances set out in the preceding paragraph would deprive the defendant of due process of law in violation of the Fifth Amendment to the Constitution of the United States."

Dealing with the latter question first, petitioners' point of law has already been litigated and decided by this Court. Rule 37(b)(2) specifically provides that an answer may be struck and default judgment entered where a litigant disobeys court orders in respect of a Rule 34 discovery motion. Such relief does not deprive a litigant of due process of law. *Hammond Packing Company* v. *State of Arkansas,* 212 U. S. 322 (1909), *National Union of Marine Cooks and Stewards* v. *Arnold,* 348 U. S. 37 (1954). The rationale announced by this Court is that the answer of a litigant who comports himself in defiance of court orders may be presumed to be in bad faith and untrue.

Finally, putting aside the fact that petitioners' personal jurisdiction point was so patently frivolous that it was not raised or argued before Judge Ryan or before the Court of Appeals, putting aside the fact that petitioners' inattention to this point plainly reflects that the facts established on the venue motion demonstrate valid personal jurisdiction under the New York long arm statute, and putting aside the fact that petitioners' participation in post-judgment, but jurisdictionally ancillary proceedings, constituted a further submission to jurisdiction, the ultimate point is that, in any event, this so-called defense, like all other defenses in petitioners' answer, is subject to striking on account of petitioners' adjudicated default.

There is nothing sacrosanct about that part of petitioners' answer which alleged a defense of lack of personal jurisdiction. Petitioners' entire answer—presumed by the law to be in bad faith and untrue—might theoretically have contained other defenses of possible merit. But with the exception of subject matter jurisdiction, (the absence of which cannot be waived), personal jurisdiction may be waived, and the refusal of petitioners to make discovery pursuant to Court Order stands clearly as conduct equivalent to waiver. See: *Redditt* v. *Hale,* 189 F. 2d 386 (8th Cir. 1952); Federal Rules of Civil Procedure, Rule 12(h). See also *Goldlawr* v. *Heiman,* 288 F. 2d 579, 584 (2d Cir. 1961), rev'd on other grounds, 369 U. S. 463 (1962).

In any event this newly resurrected defense was abandoned by petitioners' failure to assert it before the Court of Appeals for the Second Circuit. *Lawn* v. *United States,* 355 U. S. 339, 362 (1958); *California* v. *Taylor,* 353 U. S. 553, 556 (1957); *Larkin* v. *United Association of Journeymen, etc.,* 338 F. 2d 335, 336 (1st Cir. 1964), *cert. den.* 380 U. S. 975 (1965); *Abrams* v. *American Security & Trust Co.,* 111 F. 2d 520 (D. C. Cir. 1940); *Bumpus* v. *Remington Arms Co., Inc.,* 183 F. 2d 507 (8th Cir. 1950); *J. F. White Engineering Corporation* v. *United States,* 311 F. 2d 410 (10th Cir. 1962). See also: *Dower* v. *United Air Lines, Inc.,* 329 F. 2d 685 (9th Cir. 1964); *Maher* v. *Cities Service Pipe Line Company,* 286 F. 2d 313 (10th Cir. 1960).

As final response to the Petition, we call attention to petitioners' continuing defiance of requirements of the Rules—most recently manifested by their failure to attend and be examined pursuant to the requirements of Rule 69(a) of the Federal Rules of Civil Procedure. In that posture petitioners should not be allowed to invoke the procedures of the courts for their benefit even if, unlike

this case, they had meritorious points to present. *National Union of Marine Cooks & Stewards* v. *Arnold,* 348 U. S. 37 (1954). The clean hands doctrine is essentially but a variant expression of the grounds upon which the Court should close its portals to litigants who conduct themselves in a manner fundamentally inconsistent with their obligations as litigants. *United States* v. *Morgan,* 307 U. S. 183 (1939), *Cochran* v. *Burdick,* 89 F. 2d 831 (D. C. Cir. 1937).

CONCLUSION

If this Court were transmuted into a Court of Appeals nothing contained in the Petition would cause the Court in the slightest degree to disturb the judgment of the District Court. Where, as here, the underlying points advanced by petitioners not only lack legal merit as well as factual foundation, but lack as well any remote relationship to the additional requirements necessary for certiorari jurisdiction, the Petition should be in all respects denied.

Respectfully submitted,

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